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14 Attorneys for Defendant City of Burbank

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF LOS ANGELES

17 WILLIAM TAYLOR,

18 Plaintiff,

19 v.

20 CITY OF BURBANK and
21 DOES 1 through 100, inclusive,

22 Defendants.

Case No. BC 422252
Assigned to: Hon John L. Segal

**DEFENDANT CITY OF BURBANK'S
MOTION TO QUASH TRIAL
SUBPOENA SERVED UPON RICHARD
KREISLER; DECLARATION OF
RICHARD M. KREISLER**

Trial Date: March 5, 2012
Action Filed: Sept. 22, 2009

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY**

3 Plaintiff's efforts to subpoena Richard Kreisler is an ill-conceived effort to violate the
4 rights of the defendant City of Burbank ("City") to preserve the confidentiality of its attorney-
5 client communications—one of the fundamental rights to our legal system. Mr. Kreisler, an
6 attorney with the law firm of Liebert Cassidy Whitmore, was hired by the City to provide legal
7 advice after new information surfaced in 2009 suggesting that officers had lied during the course
8 of the 2008 Portos Internal Affairs Investigation ("2008 Portos IAI"), and that one or more
9 officers had actually engaged in excessive force during the underlying criminal investigation.

10 Plaintiff posits that Mr. Kreisler "investigated" those allegations, but that mere assertion
11 does not make it so. As plaintiff's counsel well knows, James Gardiner, a retired Chief of Police
12 from San Luis Obispo, was hired by the City to perform the investigation. Mr. Kreisler provided
13 legal advice to the City, and to Mr. Gardiner as necessary, but did not conduct any part of the
14 investigation. The City has consistently objected in discovery to any questions seeking any
15 communications to and from Mr. Kreisler on the basis of attorney-client communications. It is
16 entirely disingenuous for plaintiff to subpoena Mr. Kreisler for trial, and a transparent attempt to
17 try to engender negative reaction to the City in the jury by forcing him to assert clearly applicable
18 attorney-client privilege on the witness stand.

19 The Court should grant the Motion to Quash as matter of law because Mr. Kreisler's
20 testimony is subject to the absolute protection of the attorney-client privilege.

21
22 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

23 **A. The 2008 Internal Affairs Investigations**

24 In December 2007, Porto's Bakery in the City of Burbank was robbed, and the BPD
25 conducted an investigation of that crime ("the Porto's Robbery Investigation"). Thereafter, the
26 City received information that an officer or officers had engaged in the use of excessive force
27 during a suspect interview during the Porto's Robbery Investigation. The BPD conducted an
28 internal investigation of the alleged misconduct (the "2008 IA Investigation") under investigation

1 No. IA 4-26-08-1, but the evidence uncovered during that investigation did not substantiate the
2 misconduct claims.

3
4 **B. The 2009 Gardiner Investigations**

5 In 2009, however, significant new information about the same purported use of excessive
6 force against the same Porto's Robbery suspect was brought to the attention of the BPD. The
7 City contacted attorney Richard Kreisler for legal advice concerning this development.

8 [Declaration of Richard Kreisler ("Kreisler Decl."), attached hereto, ¶ 2.]

9 After obtaining legal advice from Kreisler, the City hired James Gardiner, a former chief
10 of Police for the City of San Luis Obispo, to evaluate both the previous and newly revealed
11 information concerning the incident involving the same alleged victim of excessive force during
12 that robbery investigation. Chief Gardiner's investigations commenced on or about April 16,
13 2009, under a master investigation number, IA 4-16-09-1. Chief Gardiner's initial investigation
14 led to revelations as to other allegations of use of force both in the Porto's Bakery robbery and
15 other historical events, and led to allegations of other purported misconduct by various BPD
16 officers. After all was said and done, Chief Gardiner had opened thirty-eight separate
17 investigations into more than twenty different BPD officers (the "Gardiner Investigations"), as
18 subsets of the master investigation No. IA 4-16-09-1.

19 Mr. Kreisler did not participate in Mr. Gardiner's investigation, except to provide legal
20 advice. [Kreisler Decl., ¶ 3-4.]

21
22 **III. THE COURT HAS DISCRETION TO QUASH TRIAL SUBPOENAS**

23 *California Code of Civil Procedure* section 1987.1 authorizes the Court to grant a motion
24 to quash a trial subpoena upon motion:

25 "If a subpoena requires the attendance of a witness or the
26 production of books, documents or other things before a court, or at
27 the trial of an issue therein..., the court, upon motion reasonably
28 made by [a party or the witness] may make an order quashing the
subpoena entirely, modifying it, or directing compliance with it
upon such terms or conditions as the court shall declare, including
protective orders. In addition, the court may make any other order

LA #4814-7444-4302 as may be appropriate to protect the parties, the witness, the

1 consumer or the employee from unreasonable or oppressive
2 demands including unreasonable violations of the right of
3 privacy...”

4 It is well settled that a trial court may quash a subpoena that is regular on its face when the facts
5 justify such an action. *Fabricant v. Superior Court* (1980) 104 Cal.App.3d 905, 915 [Court found
6 frivolous and quashed subpoenas for three attorneys as witnesses to support defendant’s request
7 for a telephone in his jail cell].) Under Section 1987.1, any party may move a court to exercise
8 its jurisdiction to quash a subpoena that is “unreasonable or oppressive.” *Southern Pacific Co. v.*
9 *Superior Court of Los Angeles County* (1940) 15 Cal.2d 206, 211 (court issuing subpoena has the
10 power to quash or modify it); *Allen v. Superior Court of Contra Costa County* (1984) 151
11 Cal.App.3d 447, 452 (term “oppressive” is “deliberately vague”).

12 A motion to quash may be made by a party, as the City moves here. CCP § 1987.1(b)(1).
13 Courts can and do quash subpoenas seeking testimony or information that is not relevant to the
14 claims being heard. *People v. Condley* (1977) 69 Cal.App.3d 999, 1017-1018 (court did not err in
15 quashing subpoena issued during trial where no showing of relevance); *Davis v. Superior Court*
16 (1992) 7 Cal.App.4th 1008, 1017-1018 (motion to quash should have been granted which sought
17 private information which was not relevant because it had not been tendered in issue); *Fabricant,*
18 *supra*, 104 Cal.App.3d at 907 (trial court granted motion to quash for lack of relevant testimony).
19 The Court should quash the subpoena issued to Mr. Kreisler.

20 **IV. THE REQUESTED INFORMATION IS SUBJECT TO THE ABSOLUTE** 21 **PROTECTION OF THE ATTORNEY-CLIENT PRIVILEGE**

22 “The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for
23 almost 400 years.” *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599. A client has a privilege
24 to refuse to disclose confidential communications between the client and its attorneys. *Evid.*
25 *Code* § 954; *Mylan Laboratories Inc. v. Soon-Shiong* (1999) 76 Cal.App.4th 71, 79. The privilege
26 applies to legal advice both made in anticipation of litigation and also when no litigation is
27 threatened. *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371. A governmental entity may
28 claim the attorney-client privilege. *Id.*

1 The privilege is absolute. Unless a statutory exception is shown to apply, evidence
2 protected by the attorney-client privilege may not be ordered disclosed regardless of the purported
3 relevance, necessity, or other circumstances of the case. *Costco Wholesale Corp. v. Superior*
4 *Court* (2009) 47 Cal.4th 725, 732; *Shannon v. Superior Court* (1990) 217 Cal.App.3d 986, 995.

5 Moreover, the type of legal advice sought is irrelevant to the privilege, even if the advice
6 goes beyond matters for which the attorney was originally consulted. *Benge v. Superior Court*
7 (1982) 131 Cal.App.3d 336, 347. The privilege applies to the attorneys' legal opinions, as well as
8 to any un-communicated opinions of the attorney. *Evid. Code* § 952; *Benge, supra*, 131
9 Cal.App.3d at 345.

10 Preserving the confidentiality of attorney-client communications is fundamental to our
11 legal system. The privilege encourages clients to make full disclosures to their attorneys without
12 fear of revelation to others. It protects a client's right to freely and fully confer with and confide
13 in an attorney and to receive competent legal advice. *City & County of San Francisco v. Superior*
14 *Court* (1951) 37 Cal.2d 227, 235; *Mitchell, supra*, 37 Cal.2d at 599; *Costco Wholesale, supra*, 47
15 Cal.4th at 732.

16 The City has clearly established that Mr. Kreisler was hired as an attorney by the City of
17 Burbank. As such, his testimony is privileged and the subpoena should be quashed.

18
19 **V. PLAINTIFF CANNOT MEET HIS BURDEN TO SHOW THAT KREISLER**
20 **ACTED AS A FACT-FINDING INVESTIGATOR**

21 Plaintiff will undoubtedly argue that Mr. Kreisler was acting as an independent fact finder
22 and investigator, not to provide legal advice, and that his actions are not subject to the privilege
23 under *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 123-124. It
24 is his burden to point to evidence to support this claim.

25 "The party opposing the privilege must bear the burden of showing that the claimed
26 privilege does not apply or that an exception exists or that there has been an expressed or implied
27 waiver. [Citation.]" *Wellpoint, supra*, 59 Cal.App.4th at 123-124 (citing *Lipton v. Superior Court*,
28 *supra*, 48 Cal.App.4th at p. 1619.) Nevertheless, Taylor "could not meet this burden by simply

1 asserting” that Kreisler was engaged in a fact-finding mission. *Wellpoint, supra*, 59 Cal.App.4th
2 at 123-124. He must point to facts.

3 Plaintiff does not dispute that Jim Gardiner was to conduct, and did conduct the
4 investigation at issue which led to plaintiff’s termination. Despite the fact that the contents of that
5 investigation has been produced to him, plaintiff cannot point to any part of it to support a claim
6 that Kreisler actually was a fact finding investigator. At best, plaintiff will point to a City Council
7 memorandum which mis-labels the investigation as being by Gardiner and Kreisler. This mere
8 mis-characterization in labeling does not provide evidence that Kreisler was hired to perform fact
9 finding.

10 In *Wellpoint, supra*, 59 Cal.App.4th at 123-124, it was suggested that evidence that the
11 employer’s usual practice is to hire attorneys to do the fact finding might be used to support the
12 inference that an attorney’s role in a discrimination case at issue was in line with that usual
13 practice. But that logic fails where, as here, the City also hired a non-attorney investigator who
14 then undisputedly performed the investigation. In this case, it is clear that the City kept the roles
15 of legal advisor and fact finding investigator separate.

16 Therefore, since the attorney-client privilege is absolute, Mr. Kreisler’s testimony on any
17 issues actually relevant to this case would be absolutely privileged. The only purpose that could
18 be served by plaintiff putting Mr. Kreisler on the stand is to force him to assert the City’s
19 privilege in front of the jury and hope that the jury jumps to improper negative conclusions. This
20 is in clear violation of law. Indeed, the Court has already granted the defendants’ Motion In
21 Limine no. 6 to prevent the improper comment on the assertion of privilege. See CACI 215. It
22 should not permit plaintiff to work around this issue by putting on a witness for the sole purpose
23 of forcing that party to claim a privilege in front of the jury. The Court should rule on objections
24 to evidence in a matter designed “to avoid the unfairness caused by the presentation of prejudicial
25 or objectionable evidence to the jury, and the ‘obviously futile attempt to unring the bell.” *Peat,*
26 *Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal .App.3d 272, 288.

27 As such, since the absolute protection of the attorney-client privilege applies, the Court
28 should quash the subpoena served upon Richard M. Kreisler.

1 **VI. CONCLUSION**

2 For all of the foregoing reasons, the Court should grant this Motion to Quash the subpoena
3 plaintiff served upon attorney Richard M. Kreisler.

4
5 Dated: March 6, 2012

BURKE, WILLIAMS & SORENSEN, LLP
Ronald F. Frank
Robert J. Tyson

6
7
8 By: 

9 Robert J. Tyson
10 Attorneys for Defendant
11 City of Burbank
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DECLARATION OF RICHARD M. KREISLER

I, Richard M. Kreisler, hereby declare as follows:

1. I am an attorney licensed to practice before this Court and partner with the law firm of Liebert Cassidy Whitmore. I have over 35 years of attorney experience and have been with my current law firm since 1989. Unless otherwise stated, I have personal knowledge of all of the following statements, and if called to testify, I could and would testify competently thereto.

2. In April 2009, I was engaged by the City of Burbank (the "City") to provide legal advice in relation to an investigation of personnel of the Burbank Police Department arising from the Porto's Bakery robbery investigation.

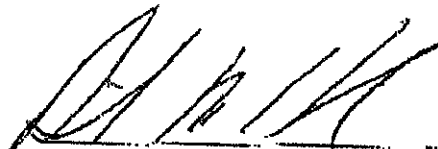
3. The City hired James Gardiner, a former chief of police of the City of San Luis Obispo, to conduct an investigation into the Porto's Bakery robbery investigation.

4. I provided legal advice to both the City and, in my role as legal advisor to the City, to the City's hired investigator, Mr. Gardiner. I was not retained to and did not act as an investigator in Mr. Gardiner's investigation.

5. I was served with a trial subpoena requiring my appearance at the trial in this matter on Wednesday, March 7, 2012. A true and correct copy of that subpoena is attached hereto as Exhibit A. My communications with the City, through its representatives (including with the City's investigator Mr. Gardiner), were communications between an attorney and client.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 5th day of March, 2012, at Los Angeles, California.



Richard M. Kreisler

SUBP-001

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): GREGORY W. SMITH (SBN 134385) LAW OFFICES OF GREGORY W. SMITH 9100 WILSHIRE BOULEVARD, SUITE 345E BEVERLY HILLS, CALIFORNIA 90212		FOR COURT USE ONLY
TELEPHONE NO.: (310) 777-7894 ATTORNEY FOR (Name): Plaintiff WILLIAM TAYLOR	FAX NO.: (310) 777-7895	
NAME OF COURT: SUPERIOR COURT OF THE STATE OF CALIFORNIA STREET ADDRESS: 111 NORTH HILL STREET MAILING ADDRESS: 111 NORTH HILL STREET CITY AND ZIP CODE: LOS ANGELES, CALIFORNIA 90012 BRANCH NAME: CENTRAL DISTRICT		
PLAINTIFF/PETITIONER: WILLIAM TAYLOR DEFENDANT/RESPONDENT: CITY OF BURBANK, et al.		
CIVIL SUBPOENA For Personal Appearance at Trial or Hearing		CASE NUMBER: BC 422 252

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of witness, if known):

RICHARD M. KREISLER, LIEBERT CASSIDY WHITMORE, 6033 CENTURY BOULEVARD, #500,
LOS ANGELES, CALIFORNIA 90045, TEL. NO. (310) 981-2000

1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below
UNLESS you make an agreement with the person named in item 2:

a. Date: MARCH 7, 2012 Time: 9:00 A.M. ☒ Dept.: "50" ☐ Div.: ☐ Room:
b. Address: 111 NORTH HILL STREET, DEPT. "50"
LOS ANGELES, CALIFORNIA 90012

2. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:

a. Name of subpoenaing party or attorney:
GREGORY W. SMITH (SBN 134385)

b. Telephone number: (310) 777-7894

3. **Witness Fees:** You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them at the time of service. You may request them before your scheduled appearance from the person named in item 2.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date Issued: MARCH 1, 2012

GREGORY W. SMITH (SBN 134385),
(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON ISSUING SUBPOENA)

ATTORNEYS FOR PLAINTIFF
(TITLE)

Requests for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before the date on which you are to appear. Contact the clerk's office or go to www.courtinfo.ca.gov/forms for Request for Accommodations by Persons With Disabilities and Order (form MC-410). (Civil Code, § 54.8.)



(Proof of service on reverse)

EXHIBIT A

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**DEFENDANT CITY OF BURBANK'S MOTION TO QUASH TRIAL
SUBPOENA SERVED UPON RICHARD KREISLER;
DECLARATION OF RICHARD KREISLER**

Amelia Ann Albano, City Attorney
Carol A. Humiston, Sr. Asst.
City Attorney
275 East Olive Avenue
Post Office Box 6459
Burbank, CA 91510

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 6, 2012, at Los Angeles, California.

Agnes D
Agnes D

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12 Attorneys for Defendant
13 CITY OF BURBANK

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF LOS ANGELES**
16

17 WILLIAM TAYLOR,

18 Plaintiff,

19 vs.

20 CITY OF BURBANK,

21 Defendant.
22
23

Case No: BC422252

Assigned to: Hon John L. Segal, Department 50

PROOF OF PERSONAL SERVICE

Trial Date: March 5, 2012
Action Filed: Sept. 22, 2009

24 This declaration of service is made pursuant to California Code of Civil Procedure Code
25 § 1011. I declare that I am employed in the County of Los Angeles, State of California, where
26 this personal service occurred. I am over the age of 18 years and not a party to this action. My
27 business address is 444 South Flower Street, Suite 2400, Los Angeles, California 90071.
28

1 On March 6, 2012, I personally served a copy of the following document(s):
2 DEFENDANT CITY OF BURBANK'S MOTION TO QUASH TRIAL SUBPOENA
3 SERVED UPON RICHARD KREISLER; DECLARATION OF RICHARD KREISLER

4 These documents were handed to:

5 Gregory W. Smith, Esq.
6 Law Offices of Gregory W. Smith
7 9100 Wilshire Blvd., Suite 345E
8 Beverly Hills, CA 90212

Christopher Brizzolara, Esq.
1528 16th Street
Santa Monica, CA 90404

9 Linda Miller Savitt, Esq.
10 Phillip L. Reznik, Esq.
11 Ballard Rosenberg Golper &
12 Savitt, LLP
13 500 North Brand Boulevard
14 20th Floor
15 Glendale, CA 91203-9946

16 in Department 50 of the Los Angeles County Superior Court.

17 I declare under penalty of perjury under the laws of the State of California that the above
18 is true and correct, and executed this 6TH day of March, 2012, at Los Angeles, California.

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Tony Kay